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Supreme Court of the United States

OCTOBER TERM, 1952

No. 196

GEORGE W. FERGUSON AND D. O. SPIRES,
PETITIONERS,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO CERTIORARI

T. C. CALLISON,
Attorney General,

WILLIAM A. DALLIS,
Assistant Attorney General,

T. P. TAYLOR,
Solicitor, Fifth Judicial Circuit,
Columbia, S. C.,
Attorneys for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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BASIS OF JURISDICTION

The Petitioners invoke the jurisdiction of this Court under Title 28, Section 1251, paragraph 3, U. S. Code.

The Respondent respectfully submits that Section 1251 (3) is not applicable in this instance since it refers to the original jurisdiction of this Court of actions between one State and citizens of another State. It will be noted that the Petitioner Spires is a citizen of South Carolina. (See Transcript of Record, p. 221.)

Respondent contends that the proper Statute applicable in the instant case is Section 1257 of Title 28, the pertinent provisions of which are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision can be had, may be reviewed by the Supreme Court as follows: • • •
>
> By Writ of Certiorari, • • • where any title, right, privilege or immunity is specially set up or classes under the Constitution of the United States."

In order to obtain review in this Court, Petitioners must also comply with Rule 38 of the Court, the applicable portion of which is as follows:

> "5. A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered.
>
> (a) Where a State Court has decided a federal question of substance not theretofore determined by this Court, or have decided it in a way probably in accord with applicable decisions of this Court."

THERE IS NO FEDERAL QUESTION INVOLVED

The Petitioners, in seeking the review by this Court of the judgment of the Supreme Court of South Carolina, which upheld the conviction of the Petitioners, contend that they have been subjected to being placed in jeopardy twice for the same offense, and further that they have been denied due process of law. This contention is based on the theory that in this instance where a common-law conspiracy, including an overt act in furtherance of the conspiracy, is alleged in one count, and a substantive offense (statutory) is alleged in a separate count of the same indictment, there will be a merger of the two separate crimes into one. They, therefore, contend that the two crimes having merged, they should have been charged with, and could have been convicted of, only one crime, that of the substantive offense

rather than both the crime of conspiracy and the substantive offense.

It is respectfully submitted that such a merger does not take place in a case such as the one presently before the Court. In this case, there is alleged a common-law conspiracy which, under the laws of South Carolina, constitutes a misdemeanor. As a second count, a violation of the lotteries law is alleged, which is also a misdemeanor. Section 1231, Code of Laws of South Carolina, 1942.

The conspiracy count contained allegations alleging an overt act in furtherance of the conspiracy. In similar language which conforms with the language of the statute, the substantive offense was alleged.

While it is unnecessary, under the South Carolina law, to allege an overt act, such was done in this case. This could be considered as being surplusage and, therefore, of no effect. 15 CJS 1131, Conspiracy, Sec. 88.

An examination of the Lotteries Law State of South Carolina, cited above and quoted at page 7 of the Petition and Argument accompanying the Petition, will show that a conspiracy to violate the Lotteries Law and the actual violation of the Lotteries Law are two separate and distinct offenses, and the proof of one is different from the proof of the other. Had nothing more been accomplished than a meeting at which it was agreed, among the parties, that a "numbers racket" would be started, the conspiracy would then be complete. Then, to go a step further and show a violation of the statute itself, it would be necessary to prove the actual setting up and operation of the "numbers racket". The Jury has found the evidence sufficient to convict the Petitioner Ferguson on both the conspiracy to operate and the actual operation of the "numbers racket", and as to the Petitioner Spires, they have found

the evidence sufficient to convict for conspiracy alone. The Supreme Court of South Carolina has further found the evidence sufficient in upholding the conviction.

We feel that we need only cite one case of this Court concerning the question of merger of the conspiracy with the substantive offense. In *Pinkerton v. United States,* 328 U. S. 641, 66 S. Ct. 1180, 90 L. Ed. 1489, this Court held that in an indictment charging violation of the Internal Revenue Code, there was no merger of the conspiracy with the substantive offenses set out.

We shall quote at length from the *Pinkerton case, supra.* On the question of merger, the Court had this to say:

> "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses * * * A conviction for the conspiracy may be had though the substantive offense was completed, (Citing cases) and the plea of double jeopardy is no defense to a conviction for both offenses * * *."

Quoting further from this case:

> "A conspiracy is a partnership in crime. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 253, 84 L. Ed. 1129, 1183, 60 S. Ct. 811. It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in *United States v. Rabinowich,* 238 U. S. 78, 88, 59 L. Ed. 1211, 1215, 35 S. Ct. 682, 42 Am. Banker Rep. 255:
>
> " 'For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized

by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.'

"And see *Sneed v. United States* (CCA 5th) 298 F. 911, 912, 913, 37 A. L. R. 772; *Banghart v. United States* (CCA 4th) 148 F. (2d) 521.

"Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed v. United States, supra* (CCA 5th) 298 F. p. 913, 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

We feel that the *Pinkerton case* and those portions quoted therefrom dispose of all questions raised by the Petitioner, including that of due process of law. The Petitioners were tried in form and course under the laws of the State of South Carolina. Throughout the course of the proceedings, from the time of the arrest of the Petitioners to the present time, they were represented by able and astute counsel who have prepared their case well. They have been afforded every opportunity which the law provides. They have shown no federal question necessitating the review by this Court.

CONCLUSION

One who seeks review of a state court's judgment in this Court has the burden of establishing the Court's jurisdiction. *Memphis Natural Gas Co. v. Beeler,* 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090. The Petitioners have failed to meet this burden becsause the question which they now seek to raise has been determined adversely to their con-

tention by decisions of this Court. Certiorari should be denied.

Respectfully submitted,

T. C. CALLISON,
Attorney General,

WILLIAM A. DALLIS,
Assistant Attorney General.

T. P. TAYLOR,
Solicitor, Fifth Judicial Circuit,
Attorneys for Respondent.